Jabalpur Bijlighar Karamchari Panchayat

Vs

Jabalpur Electric Supply Co. Ltd. and Another

Civil Appeal No. 752 of 1967

(G.K. Mitter, P. Jagmohan Reddy JJ)

09.08.1971

JUDGMENT

MITTER, J. -

1. This appeal arises out of an award, dated January 30, 1967, of the Industrial Court of Madhya Pradesh (hereinafter referred to as the 'Tribunal'). The terms of reference to the Tribunal was :

> "Whether the employees of Jabalpur Electric Supply Company Ltd., have a case for payment of bonus for the year 1960-61 and what should be its quantum and terms of payment ?"

The claim for bonus was made under two heads : the first was for bonus out of the profits quantified at 50% of the total earnings of the employees; and the second was for festival bonus at 10% of the said total earnings which was claimed as an implied term of the contract of employment and as an established practice, having been paid irrespective of profits or losses before Diwali every year continuously from 1940-41 without any break. The Tribunal found itself unable to hold in favour of the employees under either of the heads. The appeal to this Court is by special leave.

2. We propose to take the two heads under which bonus was claimed in the order in which the arguments were advanced before us. The first head of bonus canvassed for was the second mentioned above, i.e., at 10% of the total earnings. So far as this claim is concerned, we are not on uncharted seas as the question cropped up in the post in numerous cases before this Court, wherein certain well defined principles were formulated. But before we apply the principles, we have to take note of the relevant facts and circumstances relating to this claim.

3. It cannot be disputed that the employees had been receiving at least 10% of their earnings from the company from 1940-41 onwards. This period can be conveniently split up into several parts to mark off the claims made from time to time and the settlements by mutual agreement or payments under awards of Industrial Courts or even made voluntarily. The first period relates to the years 1940-41 to 1944-45. The Provincial Government made a reference arising out of a dispute which led to the award of the Labour Commissioner of C.P. and Berar in regard, inter alia, to (a) claim by the employees to a bonus equal to three months' wages for the year ending March 31, 1946, and (b) War Bonus equal to six months wages. The adjudicator decided that :

> "(1) The company should pay to each of its employees 1/10th of his total earnings including dear food allowance during the year ending March 31, 1946, by way of bonus; and (2) the Company should also pay to each of its employees as bonus 1/10th

> of his total earnings including dear food allowance in respect of each of the years 1940-41, 1941-42, 1942-43, 1943-44 and 1944-45 against the claim for war bonus."

It has to be noted that there was no mention of any festival bonus at that time and so far as the years 1940-41 to 1944-45 are concerned, it was given on the footing that it was a War Bonus.

4. The next period relates to the years 1946-47 to 1949-50. Admittedly, the payment for these years was made under an agreement between the parties as found by the Tribunal. The finding of the Tribunal is that a consolidated amount of Rs. 74,850/- was paid by the company on January 25, 1951. The Tribunal observed that there was :

> "abundant documentary evidence (Exs. D-1/A to D-1/F) wherein workers agreed to accept the bonus offered as voluntary payment of bonus as a compromise of their claim of 25% of the company's profits for the period ending March 31, 1951."

5. The claim for the years 1951 to 1956 was covered by an award conveniently described as Majumdar Award. The opening paragraphs of the award show that the employees had claimed that payment of 10% of their total earnings by way of bonus had come to be included in their wages and had been paid for about 12 years in the past, that there had been agreement between the employees of the company to refer the dispute regarding bonus to Government and thereafter for subsequent years 10% of their total earnings of the year was accepted by the employees and finally on the failure of negotiations and conciliations, following service of notice under Section 32 of the Industrial Disputes Act, the matter had been referred by the Government, the employees having pressed for at least 33 1/8% of their total earnings for the year by way of bonus.

6. The concluding paragraph of that award, a copy of which has been placed before us, shows that in the view of the Majumdar Tribunal :

> "In addition to the 10% bonus already paid the party No. 1 (the company) can easily pay additional 20% of the earnings of the year of each employee as bonus to him. Similarly for the year 1951-52 party No. 1 can pay easily additional 10% of the earnings of the year as bonus to each of the employees. For the year 1952-53 no surplus amount is left with party No. 1. According to the Full Bench formulas and the bonus already paid, i.e., 10% of the annual earnings of each of the employees was sufficient payment for that year. For the year 1953-54, 5% of the earnings of the year can easily be paid in addition to the 10% already paid. For the year 1954-55 20% of the annual earnings can easily be paid to each of the employee by way of bonus and for the year 1955-56 though I only have been able to get the account for the first six months I have absolutely no doubt that taking the average of all these years, the party No. 1 could be able to pay at least 10% as additional bonus."

The said Tribunal further recorded that as the employees had not received even the 10% usual bonus for 1955-56, the same should be paid in full before October 31, 1956.

7. For the year 1956-57 payment was made under an interim award of Mr. Kher, Judge, Industrial Court. For the years 1957-58, 1958-59 and 1959-60, payment was first made under an interim award of justice Bhat who finally passed an award accepting the claim of the Union for payment of Diwali bonus. This award was the subject matter of an appeal before this court and on March 11, 1956, the parties to the appeal arrived at a compromise and it was agreed without prejudice to their

respective contentions that the company should pay to the employees one per cent. in addition to the bonus already paid by it for the years 1956-57, 1957-58 and 1958-59, but the company should not pay any additional bonus for the year 1959-60. It was expressly recorded before this Court that as the point of dispute between the parties which had been decided by the said Tribunal had not been argued before this Court it would be open to them to raise their respective contentions in future should the occasion arise.

8. The above statement of facts makes it amply clear that although the employees received at least 10% of their total earnings by way of bonus for the years 1940-41 to 1959-60, there was no consistency in the claim to bonus throughout his period, nor was there any uniformity either in the amounts paid or the grounds under which the several awards of bonus came to be made. The only award which indicated that the bonus was to be regarded as a Diwali bonus was that of Justice Bhat, for the period 1957-58 to 1959-60. For the period 1940-41 to 1956-57, the company never paid bonus at a festival bonus on the occasion of the Diwali. The amount was mostly paid under awards but in between the awards there was a period when it was paid by express agreement between the parties.

9. Strong reliance was placed on the fact of payment of at least 10% by way of bonus from the year 1940-41 to 1959-60, by learned counsel for the appellant is support of his argument that as payment had been made for this long period, it had became an implied terms of the contract of employment and it was to be regarded as a festival bonus. In our view, this contention cannot be accepted on the face of long series of decisions of this Court to some of which alone we propose to refer.

10. In Ispahani Ltd. Calcutta v. Ispahani Employee's Union (1960) 1 SCR 24 : AIR 1959 SC 1147 : (1959) 2 LAB LJ 4), this Court had to deal with the claim of the workmen to Puja bonus for the year 1953. Referring to the Millowners' Association, Bombay v. The Rashtriya Mill Mazdoor Sangh, Bombay ((1950) LLJ 1247), it was said that the claim for Puja bonus in Bengal could be based on either of two grounds. It may either be a matter of implied agreement between the employers and employees creating a term of employment for payment of Puja bonus, or, (secondly) even though no implied agreement can be inferred it may be payable as a customary bonus. On the facts it was found that "the workmen when they were in the employ of Messrs. M. M. Ispahani Ltd. (the predecessor-in-interest of the appellant)" always used to get Puja bonus at the rate of one month's wages. This was asserted by the workmen in their written statement and the company did not deny it in its reply. It was found as a fact that the appellant had been paying bonus ever since it came into existence in 1948 up to 1952 without any break at the rate of one month's wages and it was paid even in the years when the company suffered loss. It was observed by this Court :

> "In the circumstances, it was established in this case that (1) the payment was unbroken and (2) it was paid out of bounty due to profits having arisen, for it was paid in some years of loss also."

As to what would be a sufficiently long period to justify the inference that it was an implied term of employment for payment of bonus, this Court held that the appellant had paid it continuously since its birth and therefore the facts warranted the finding of an implied term of employment to that effect.

11. A similar claim arose in the case of The Graham Trading Co. (India) Ltd. v. Its Workmen ((1960) 1 SCR 107 : AIR 1959 SC 1151 : ((1961) 1 SCJ 246). According to this Court the practice of payment of bonus of the appellant "began in 1940 and was unbroken up to 1950. In between

there was an adjudication in 1948 in which the company was a party." In regard to the year 1948 the company had admitted before the relevant tribunal of having paid bonus in the past and had no intention of discontinuing the practice and thereupon the Tribunal did not adjudication on it. The payment was continued from 1949 to 1951. In 1952 after some dispute, bonus was paid to all the workers. It was in this case that the court laid down certain criteria which the Industrial Tribunals would have to consider when a question of customary or traditional bonus arose, namely :

(i) whether the payment has been over an unbroken series of years;

(ii) whether it has been for a sufficiently long period, though the length of the period might depend on the circumstances of each case; even so that period may normally have to be longer to justify an inference of traditional and customary Puja bonus than may be the case with Puja bonus based on an implied term of employment.

(iii) The circumstances that the payment depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in the year of loss.

After laying down the tests, the court observed that :

> "In dealing with the question of custom, the fact that the payment was called ex gratia by the employer when it was made, would, however, make no difference in this regard because of proof of custom depends upon the effect of the relevant factors enumerated by us; .... the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had became customary and traditional in the particular concern."

In M/s. Tulsidas Khimji v. Their Workmen ((1963) 1 SCR 675 : AIR 1963 SC 1007 : (1964) 1 SCJ 300), the Union of workmen claimed profit-sharing bonus at the rate of six months' wages and traditional or customary bonus at a rate which was not clear but which might be said to be either three months wages or one month's wages plus dearness allowance on the occasion of the Diwali festival. The claim was rather nebulous as observed by this Court. According to the Tribunal the workmen had proved that bonus had been paid at a uniform rate of one month's basic wages plus dearness allowance on the occasion of the Diwali festival throughout the period, i.e., 15 years commencing from 1940-41 to 1956-57. Referring to the argument advanced on behalf of the appellant company that the four circumstances mentioned above in Graham Trading Co.'s case (supra) had not established, it was remarked :

> "...... what is more important to negative a plea for customary bonus would be proof that it was made ex gratia, and accepted as such, or that it was unconnected with any such occasion like a festival as laid down by this Court in the case of B. N. Elias and Co. Ltd. Employees Union v. B. N. Elias and Co. Ltd. ((1960) 3 SCR 382 : AIR 1960 SC 886 : 1960 SCJ 1233)."

12. In Vegetable Products Ltd. v. Their Workmen (AIR 1965 SC 1499 : (1965) 2 SCJ 770 : (1965) 1 Lab LJ 469), "the case of the workmen for payment of Puja bonus was that it had become either an implied term of employment between them and their employer or customary". The Tribunal came to the conclusion that payment of one month's wages before Puja as customary bonus had been established though it apparently did not accept the claim that payment of Puja bonus as an implied condition of service had been proved. The Tribunal further found that the circumstances mentioned

in Graham Trading Co.'s case (supra), had been satisfied. Examining the evidence this Court found on the facts (see p. 1501) that :

> "...... the Puja bonus was paid for the first time on the eve of the Puja festival in 1954 at the rate of 10 days' wages. In 1955 it was paid at the rate of 20 days' wages. From 1956 to 1961 the payment has been made before Puja at 30 days' wages ......from 1956 to 1958 payment was made without any dispute and without conditions. But in 1956 a dispute arose as to payment of Puja bonus for that year and was settled before the conciliation officer by a settlement between the appellant and its workmen. The first term of that settlement ...... runs thus :
>
> '...... 30 days' wages will be paid as bonus ex gratia for the accounting year 1957-51 to all the workmen who will have completed 240 days' work by the day of payment and will be on the rolls of the company on that date'."

13. It was observed that the payment for the 1959 was ex gratia and accepted as such by the workmen. According to this Court :

> "This is not a case where the employer made a unilateral declaration that the payment was ex gratia. This was a case where the appellant said that the payment was ex gratia and the workmen accepted the payment as ex gratia. Besides, there was a further condition that the payment would be made to those workmen only who had completed 240 days work by the day of payment."

14. The evidence further showed that although for the years 1960 and 1961 payment had been made at the rate of 30 days' wages the workmen had given a receipt in terms which stated the payment was made as advance to be adjusted against profit bonus for the previous year. In these circumstances, this Court found itself unable to hold that there had been payment for an unbroken series of years before the dispute was referred to the tribunal and the finding of the tribunal that payment of customary or traditional bonus on the occasion of the Puja festival was established was set aside.

15. Lastly, we may refer to Management of Churakulam Tea Estate (P) Ltd. v. The Workmen and Another ((1969) 1 SCR 931 : AIR 1969 SC 998 : (1969) 2 SCJ 282). In this case there was at first an agreement in the year 1946 relating to bonus for the year 1947, 1948 and 1949. The agreement was extended also for the years 1950 and 1951. A fresh agreement was entered into in 1955 for payment of bonus for the years 1952, 1953 and 1954 and there were subsequent agreements also. There was no controversy that the appellant had paid bones for nine years and it was not a uniform rate. So far as the year 1952 was concerned the appellant's case was that it had not paid any bonus as such, but on the other hand it had made an ex gratia payment of Rs. 3 to each worker, but the Tribunal did not accept this plea and held that the said payment must be treated as one having been made towards bonus. This Court came to the conclusion that the Tribunal was wrong in holding that an inference could be drawn for payment of bonus as an implied condition of service, in the circumstances of the case, when the payment admittedly was not uniform and was not connected with any festival. The Court also negatived the plea of the workmen to treat the bonus as a customary or traditional bonus because, apart from the fact that it was not connected with any festival, one of the essential ingredients, viz., that the payment should have been at a uniform rate through was admittedly lacking in the case.

16. The above decisions all go to negative the claim of the appellant before us. The only Act about which there can be no doubt is that payment was made at the rate of 10% for a large number of years with an intervening period when it was made at the rate of 11%. The facts do not warrant any conclusion as to the payment being related either to any festival or under an implied term of employment between the parties. It will be noted that for the very first period, i.e., the years from 1940-41 to 1945-46, there was no claim for the payment of either customary bouncer a festival bonus. On the other hand, the express claim was made for war bonus. The major part of the entire period was covered by awards and excepting in one of these awards, there was no reference to any festival bonus. There was no intervening period which, as already noted, was covered by an express agreement between the parties. The rate too, as already shown, was not uniform. Consequently the claim made by the appellants that they should be paid 10% either as festival bonus or under an implied terms of employment cannot be accepted.

17. With regard to the second claim there is no dispute that bonus must be computed in terms of the Full Bench formula as accepted by this, Court in the case of Associated Cement Companies Ltd. v. Its Workmen ((1959) SCR 925 : AIR 1959 SC 967 : (1961)) 2 SCJ 490). Learned counsel for the appellant was prepared to accept was gross profits for the adoption of the Full Bench formula as shown in the balance of the revenue account for the year ending March 31, 1961, subject to certain exceptions. This figure as shown in Schedule F to the profit and loss account was Rs. 8,88,598.29. This was, however, subject to the qualification as to several figures of expenses incurred during the year. The first related to the figure in the revenue account where the cost of coal and fuel was shown by the company as Rs. 21,12,875.97. According to the appellant, the document Ex. P-13 prepared by the Managing Agents of the company and certified as correct by their chartered accountants on September 28, 1961, showed that the fuel consumed was 54,962 tons at an average cost of Rs. 35.58. This according to the appellant was a solemn document inasmuch as it had to be prepared submitted under sub-rule (3) of Rule 26 of the Indian Electricity Rules, 1937. The settlement is headed "Summary of Technical and Financial Particulars for the year ended March 31, 1961". If the figures with regard to the quantity of coal and the average cost in Ex. P-13 be taken into account, instead of the figure Rs. 21,12,875.97 in the revenue account the correct figure would be Rs. 19,45,447/- which would swell up the gross profits by the difference between the two amounts viz., Rs. 1,57,422/-.

18. It was seriously contended before us by learned counsel for the respondent that we should accept the figure given in the balance sheet as the same is supported by certificates of the same firm of chartered accountants, and their letters addressed to the Managing Agents of the company. According to the letter Ex. D-28 dated September 20, 1961, the books and records of the Jabalpur Electric Supply Company Ltd., for the period April 1, 1960 to September 31, 1960, showed the average cost of coal delivered to bunkers during the period to be Rs. 37.31 per ton or Rs. 37.31 per ton (metric). The letter Ex. D-29 which is similarly worded shows that for the period October 1, 1960 to March 31, 1961, the average cost of coal delivered to bunkers during this period was Rs. 30.09 per ton or Rs. 38.47 per ton. These two figures sought to be supported by the certificates of the chartered accountants, dated April 18, 1963. The above will show that there was considerable discrepancy as to the value of the coal consumed as reported to the Government and as reported to the Managing Agents of the company by the accountants. This was sought to be explained in the oral evidence of one L. S. Mcleod, who stated that the statement prepared under the Electricity Act was on the basis of the record maintained by the Head Office but the total consumption of the coal during the year was 54,962 tons and the average cost of coal per ton was Rs. 35.58 per ton. Oral evidence was also adduced of one B. Chatterjee, an Assistant in the Electricity Department of Martin Burn Ltd., Calcutta, who stated that the rates shown in Ex. P-13, i.e., Rs. 35.58 per ton was

the estimated value of coal received per ton and that this figure has been arrived at the Power House, Jabalpur, purely on estimates and that the estimate did not take into account certain liabilities, i.e., certain suppliers' bills which were accounted for and audited at the Head Office at Calcutta. In our view, the attempted explanation cannot be accepted as Ex. P-13 was made under the provisions of an Act. It was prepared in Calcutta long after the period to which it related. It was submitted some time after the Director's reports to the shares holders, dated September 4, 1961, accompanying the balance sheet and the profit and loss account. It was for the company to explain exactly how the discrepancy arose and their failure to explain, in our opinion, should lead to the grossing up of the amount of difference already mentioned with the gross profits as per the revenue account.

19. The next disputed item related to the amount of Rs. 85,887.63 as shown in the revenue account towards "miscellaneous expenses". The item reads "miscellaneous expenses including Rs. 3,025.16 for wages and Rs. 4,123.74 paid to Martin Burn Ltd., as guarantors' commission". The company was asked to furnish particulars of the items which added up to Rs. 85,887.63. According to Ex. P-18 the said figure was made up of the following : Rs. 34,514.11 as cost of printing, stationery and advertisement, Rs. 12,648.18 as travailing expenses, Rs. 7,207.80 as general charges, Rs. 6,206.57 bank charges, Rs. 4,128.74 as guarantors' commission and Rs. 21,112.23 as repairs to furniture, etc. It was this last figure which was challenged by the appellant. Schedule B to the balance sheet for the relevant year (fixed capital expenditure) shows that the original cost of furniture and equipment up to March 31, 1960 was Rs. 38,377.78 and that additions, sales and adjustments during the year was Rs. 5,498.76 and the total depreciation written off to March 31, 1961 was Rs. 29,915.23. It is difficult to appreciate how furniture the total cost of acquisition of which was Rs. 43,876.54 as shown in Schedule E would require repairs to the extent of Rs. 21,000.00 in one year as shown in the particulars supplied. Mr. L. S. Mcleod admitted that the he could not trace any expenditure having been shown in respect of repairs of furniture in the summaries of receipts and monthly expenditure and that his estimate of the amounts spent for repairs would be less than Rs. 500. Mr. B. Chatterjee said, the amount also included the hire charges of the office equipment. He did not refer to any books of account out support the statement. In the absence of proper explanation supported by the books of account of the company, the figure of Rs. 21,112/- ought not to be accepted and taking into account Rs. 500/- as stated by Mr. Mcleod as having been spent for repairs to furniture a sum of Rs. 80,612/- should be added to the gross profits.

20. The third item to be added to the gross profits according to the appellant was the figure of internist Rs. 16,645.53 shown in Schedule F for computation of net profits in accordance with Section 349 of the Companies Act, 1956 with details of calculation of Managing Agents' remuneration for the year ended March 31, 1961. This amount according to the appellant should have found a place in Ex. D-11 being a "Statement of surplus/deficiency of profits for the year ended March 31, 1961," i.e., the working sheet complied by the company. This interest accrued to the company out of the statutory investments as shown in Schedule C to the balance sheet. Schedule C gives the statutory contingencies reserve fund investments, the book value thereof being Rs. 2,30,880.37 quoted on the stock exchange, besides Rs. 50,031.35 which was not so quoted, the total coming to Rs. 2,80,911.62. Although the statutory contingency reserve fund investments are not to be taken into account in "the statement of surplus and deficiency of profits" it was included in the statement of net profits for the calculation of managing agent's commission and we see no reason why the same should be left out of account in Ex. D-11. Mr. Chagla contended that the workers had done nothing during the year of account, i.e., April 1, 1960 to March 31, 1961, which entitled them to claim the benefit of this amount of interest. While it is true that their claim cannot be rested on any work down by them for the company during the year of account there can be no question that

the interest accrued to the company out of the efforts of the workers in the past which had not been taken into account in calculating bonus. The managing agents had done nothing in the year of account to entitle them to take into account the amount of interest which accrued to the company during the year of account. If they were entitled to claim a share of it the workers were equally entitled to base their claim for its inclusion in Ex. D-11. The result is that the gross profits of the company as shown in Ex. D-11 would have to be augmented by the sums of Rs. 1,57,428/-, Rs. 20,612/- and Rs. 16,645.53.

21. On behalf of the appellant dispute was also raised to the deduction of several items of Ex. D-11 namely : (1) rebate to consumers Rs. 17,046.00; (2) depreciation to the extent of Rs. 3,55,755/- as also double shift allowance of Rs. 95,256/-; (3) income-tax at 45% as per Finance Act, i.e., Rs. 1,07,052/- and (4) return of 6% on working capital which was quantified at Rs. 8,25,243/-. According to the Tribunal it was not necessary to consider the other two items, return at 6 per cent. on other reserves employed in the business, i.e., Rs. 55,38,296/- and rehabilitation reserve of Rs. 30,15,202/- as in his view even without taking these two last figures the working sheet Ex. D-11 showed a negative balance, that is to say absence of any surplus resulting out of which the workers could claim anything by way of profit bonus.

22. With regard to rebate to consumers it was argued before the Tribunal that it was never paid to the consumer as the Sixth Schedule to the Electricity Supply Act, under Paragraph II(1) went to show that :

> "If the clear profit of a licensee in any year of account is in excess of the amount of reasonable return, one-third of such excess, not exceeding five per cent of the amount of reasonable return, shall be at the disposal of the undertaking. Of the balance of the excess, one-half shall be appropriated to a reverse which shall be called the Tariffs and Dividends Control Reserve and the remaining half shall either be distributed in the form of proportional rebate on the amounts collected from the sale of electricity and meter rentals or carried forward in the accounts of the licensee for distribution to the consumers in future, in such manner as the State Government may direct."

23. This goes to show that the rebate to the consumers is not to be utilised by the company except for distribution to the consumers as may be directed. If the company cannot have the benefit of it, it stands to reason that the workers cannot ask for a share and the claim of the appellant for inclusion of this sum must be rejected.

24. It was next argued on behalf of the appellant that the Tribunal should not have allowed depreciation in excess of the figure which was shows in the profit and loss account of the company, viz., Rs. 2,51,405.80. The Tribunal accepted the depreciation to the extent of Rs. 3,55,755/- but disallowed the claim with regard to double shift allowance. The judgment of this Court in The Associated Cement Companies (supra), shows that this Court accepted the formula propounded by the Full Bench of the Labour Tribunal in U. P. Electric Supply Co. Ltd. v. Their Workmen. ((1955)-II LLJ 431). In U. P. Electric Supply Co.'s case (supra), the Full Bench of the Labour Appellate Tribunal had stated (see p. 440) that :

> "Upon a careful consideration of the matter we are of the view the only normal depreciation, including multiple shift depreciation, but not initial or additional depreciation, should rank as a prior charge in applying our Full Bench formula."

25. This case came up for consideration again in T. T. E. Supply Co. Ltd. v. Its Workmen ((1960) 3 SCR 68 : AIR 1960 SC 782 : 1960 SCJ 734) and The Ahmedabad Miscellaneous Industrial Workers Union v. The Ahmedabad Electricity Co. Ltd.((1962) 2 SCR 934 : AIR 1962 SC 1255 : (1962) 2 SCJ 489), and was approved of in both. That Rs. 3,55,755/- was the normal depreciation for the year is amply borne out by the assessment order of the Income-tax Officer for the relevant year which is Ex. D-20 in this case. The company further filed statements of depreciation in respect of each of the assets from 1948 to 1961 and the totals of the figures and up to the exact sum of Rs. 3,55,755/-.

26. With regard to the claim of double shift allowance Mr. B. Chatterjee the company's witness, stated that the amount of Rs. 95,266/- represented the double shift allowance but they did not claim it in the income-tax assessment inasmuch as if they had done so in the year of account, this would have increased their burden of tax in the subsequent years and it was to regulate the stability of profits that they did not claim double shift in the income-tax returns. We see no reason to reject the evidence of Mr. Chatterjee. The fact that in the balance-sheet the company showed only Rs. 2,51,405.80 was not conclusive on the question. What amount of depreciation the company will claim under the Income-tax Act in order to allow some profits to be distributed among the shares-holders is a concern entirely of the company so long as they do not claim anything more than what the law allows. It is significant to note that this Court pointed out in. The Ahmedabad Miscellaneous Industrial Worker's Union case (supra) that the Income-tax Rules should be applied in calculating depreciation under the Full Bench formula in preference to the provisions of the Seventh Schedule to the Electricity Supply Act as this would work for uniformity in all industrial concerns. A contention similar to the one put forward by the appellant in this case was rejected by this Court in Hamdard Dawakhana Wakf v. Its Workmen. (1962-II LLJ 772 : (1963) 6 FLR 86) The notional normal depreciation there claimed by the employer and which would be allowable under the Income-tax Act was Rs. 2,22,867/- but the Tribunal allowed only Rs. 1,06,785/- as this figure had been shows by the appellant in its profit and loss count. This Court observed that :

> "In the profit and loss account, it is the actual depreciation that would be shown and not the notional normal depreciation and so, the fact that the former depreciation has been shown in the profit and loss account cannot be held to be a factor against the appellant."

27. It was also remarked that the accountant of the appellant had produced the figures of depreciation in various exhibits and his statements had not been challenged in cross-examination and therefore there was no reason to disallow the claim of depreciation of Rs. 2,22,867/-.

28. On reasoning similar to the above it was argued on behalf of the appellant that there was no jurisdiction for the Tribunal's disregarding the income-tax actually paid by the company as per the assessment order, viz., Rs. 53,896.80. But this in our opinion cannot be accepted as the available surplus has to be found out by working on the Full Bench formula of the Labour Appellate Tribunal. There can be no question that income-tax has to be nationally computed at 45% after deduction from the gross profits, the expenses shown in Ex. D-11 ending with notional normal depreciation and doubt shift depreciation. The Tribunal allowed Rs. 1,07,052 but the result of the additional to the gross profit of Rs. 8,88,598/- (1) the difference in the value of the coal consumed; (2) the amount disallowed out of the furniture repairs; and (3) the interest amount of Rs. 16,645/- the income-tax to be allowed in the working sheet would be Rs. 1,94,435/- in place of Rs. 1,07,052/-.

29. The last item disputed by the appellant was the return on working capital which was shows as

Rs. 8,25,243/- in Ex. D-11. The evidence given on this head was that of Mr. B. Chatterjee. He referred to various exhibits viz., Exs. D-22 to D-27 in this connection. Ex. D-22 was a statement compiled for showing reserves available as working capital. Ex. D-24 and D-25 went to show that at the relevant period, any company was borrowing moneys from the United Bank of India Ltd. The Tribunal accepted the company's case that the Rs. 8,25,243 should be taken to be the working capital of the company for the relevant year and return at 6% should be deducted to arrive at the available surplus for distribution. The evidence on this head was furnished by Mr. B. Chatterjee who said that the sum had been calculated as shown in Ex. D-11 in accordance with Clause XVIII(c) of the Sixth Schedule to the Electricity Act, and this sum being the lesser of the two was incorporated in Ex. D-11. The details of the requirement of liquid funds to run the undertaking was given in Ex. D-16. In his cross-examination Chatterjee said that besides the items shown in Ex. D-22 (statement of reserves) and other funds which had been used as working capital, the company had to take the loan in spite of these reserves which were already employed in the business as working capital.

30. Mr. Chagla contended that the working capital as computed in accordance with Schedule VII of the Electricity Supply Act being a statutory computation could be taken into account even for the working out of the Full Bench formula of the Labour Appellate Tribunal. In our view, this is not the correct position in law. In T.T.E. Supply Company's case (supra), the question considered by this Court was whether the Full Bench formula should be applied to an electric supply undertaking in preference to the provisions of the different clauses of Paragraph XVII of the Sixth Schedule to the Electricity Supply Act and this Court concurred with the view expressed by the Labour Appellate Tribunal that even in such a case the Full Bench formula should be applied. In the Ahmedabad Miscellaneous Industrial Worker's Union's case (supra), where one of the questions before his Court has whether depreciation should be calculated according to the provisions of the Income-tax Act and the rules framed thereunder or according to the provisions contained in the Seventh Schedule to the Electricity Supply Act, it was held that the rates prescribed under the rules framed under the Income-tax Act lay down the proper measure of depreciation to be allowed as in the view of this Court the filed of industrial relations in connection with which the Full Bench formula was evolved, it was not proper to inject therein the provisions contained in the Seventh Schedule to the Electricity Supply Act.

31. There can be no dispute that a good portion of the reverses must have been utilised in running the company inasmuch as it was obliged to borrow moneys from the bank and pay interest thereon. It is highly, unlikely that a company which had reserves as disclosed by its balance sheet and profit and loss account would borrow money from a bank unless it was utilising the reserves for some other and more remunerative purposes. The balance sheet and the profit and loss account negative such a view and no evidence which throws light on the question was recorded.

32. We are however not called upon in this case to come to finding as to how much of the reserves were utilised as working capital in view of the fact that even without taking this item into account there is no available surplus left in terms of the working sheet which forms the basis for determining the available surplus.

33. The working sheet according to us should be altered as follow : To the figure Rs. 6,88,905/- shown as surplus in Ex. D-11 after the deduction of various items of expenses should be added three figures, i.e : (1) coal and fuel Rs. 1,57,428/-; (2) furniture account Rs. 20,612/- and (3) interest Rs. 16,545/- making a total of Rs. 8,83,490/- as gross profits. From this will have to be deducted Rs. 4,51,011/- being the sum of notional normal depreciation of Rs. 3,55,755/- and double shift depreciation Rs. 95,256/-. This leaves a balance of Rs. 4,32,479/-. From this will have to be

deducted the income-tax of 45% which in view of the addition of the items regarding coal, furniture and interest should be Rs. 1,94,615/- in place of Rs. 1,07,052/- as shown in Ex. D-11. Deducting this from Rs. 4,32,479/- the balance left is Rs. 2,37,854. From this has to be deducted the statutory contingencies reserve and the statutory development reserve and 6% on the share capital of Rs. 22,49,850/- there being no dispute as to these figures. The result is that from the figure of Rs. 2,37,864/- there has to be deducted a sum of Rs. 2,38,585/- which leaves a negative balance of Rs. 721/-. The case of the appellant for showing an available surplus for distribution therefore disappears.

34. In the result, the appeal fails both on the point of customary or festival bonus or implied term of the contract, or profit bonus, and will be dismissed with costs.

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